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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1215

LEONARD EAST and ALVIN G. EAST, doing business as L. EAST PRODUCE COMPANY,
Petitioners

Versus

PAUL A. PORTER, ADMINISTRATOR, Office of Price Administration,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

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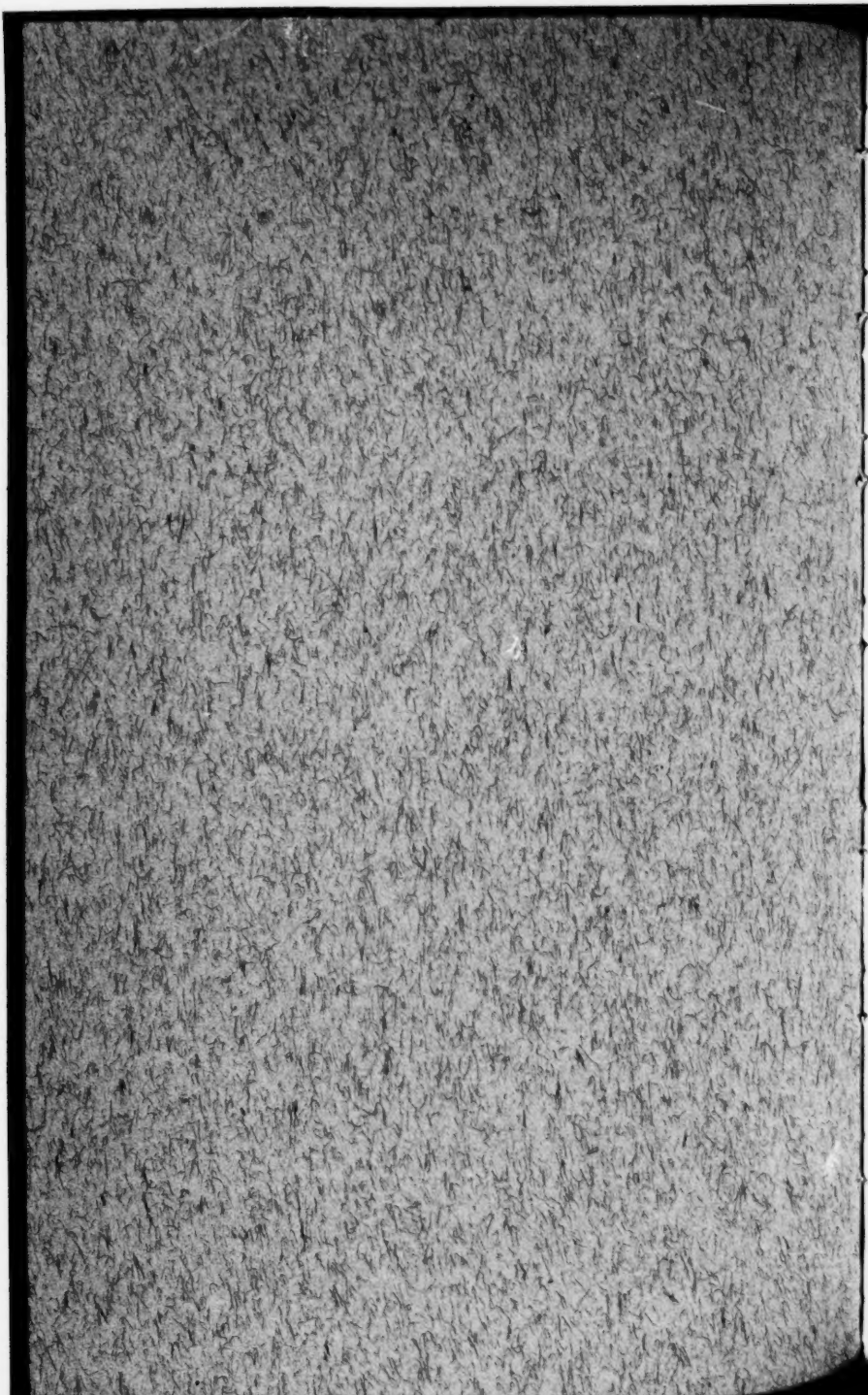

SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction	2
Summary Statement	2-8
Questions Presented	8-10
Specifications of Error	10-14
Reasons for Granting the Writ	14-18
Conclusion	18
Signature of Counsel	18

INDEX OF CASES

	Page
Bowles vs. Arlington, (C.C.A. 7), 148 F. (2d) 467	16
Bowles vs. Assad, (D.C. Penn.), 56 Fed. Sup. 8	16
Bowles vs. Cunningham, (D.C. Penn.), 61 Fed. Sup. 162	16
Brown vs. Banana Distrib. of America, (D.C. Conn.), 52 Fed. Sup. 804	16
United States vs. Steiner, (C.C.A. 7), 152 F. (2d) 484, 487	15
Zimburg vs. United States, (C.C.A. 1), 142 F. (2d) 132	16

OTHER AUTHORITIES

	Page
Emergency Price Control Act of 1942, as Amended, Sec. 4(a)	2
Emergency Price Control Act of 1942, as Amended, Sec. 205(e)	2
Judicial Code, as Amended, Sec. 240(a)	2
O.P.A. Second Revised Maximum Price Regulation No. 269, as Amended	2

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

TO THE SUPREME COURT OF THE UNITED STATES:

Leonard East and Alvin G. East, doing business as L. East Produce Company, respectfully petition that a Writ of Certiorari issue to review the final judgment of the United States Circuit Court of Appeals, Fifth Circuit, affirming the judgment of the United States District Court, Western District of Texas, Austin Division, entered in this cause.

Opinions Below

No opinion was written by the United States District Judge.

The *per curiam* opinion of the Circuit Court of Appeals (composed of Circuit Judges Hutcheson, Holmes and McCord) was rendered December 2, 1946, (R. 191); and is reported in 158 F. (2d) 227.

Jurisdiction

Jurisdiction is invoked under *Section* 240 (a) of the *Judicial Code*, as Amended, (Title 28, U. S. Code, Sec. 347 (a)).

The judgment of the Circuit Court was entered on December 2, 1946. (R. 195). Petition for Rehearing was properly filed on December 20, 1946, (R. 196), which was denied without written opinion on January 7, 1947. (R. 204).

Summary Statement

Complaint was filed by the Administrator, Office of Price Administration, under Section 205 (e) of the Emergency Price Control Act of 1942, as Amended, (Pub. Law 421, 77th Cong., 2nd Sess., 56 Stat. 23, 765, 57 Stat. 566, Pub. Law. 383, 78th Cong.) against petitioners, seeking treble damages as a penalty for alleged violations of Section 4 (a) of said Act, arising from alleged overcharges for two sales and deliveries of dressed poultry in excess of ceiling prices fixed by Second Revised Maximum Price Regulation No. 269, as Amended. (R. 1-5).

The essence of the complaint was that petitioners sold and delivered a purported quantity by weight of dressed poultry *at a legal price charged per pound,* but that a lesser quantity was actually delivered and received by the buyer, and by reason of "delivery of short weights" the shipment invoices constituted actual overcharges per pound. (R. 9-11).

Petitioners answered that:

> (a) The complaint was insufficient and failed to state a cause of action, because it did not allege the acts charged were willfully, intentionally, or knowingly committed by petitioners (R. 12);
>
> (b) Petitioners were not guilty of any act or conduct in violation of the regulation order or price schedule (R. 13);
>
> (c) If any violation had occurred, it was not willful, nor the result of a failure to take practicable precautions against its occurrence R. 13).

In open court counsel for the Administrator recognized the necessity of proving the alleged violations occurred by reason of *intentional, purposeful,* or *knowing acts* of petitioners, stating: "I think we are certainly allowed to bring in testimony in this case *to show a system and a conspiracy to short weight.*" (R. 115).

The Administrator proved only that the buyer ordered, petitioners sold, and the buyer bought a specified number of pounds of dressed poultry *at a legal price per pound* (R. 71-72, 55); that petitioners shipped, by a public common carrier, the number of

pounds ordered by the purchaser, and invoiced the purchaser for that poundage *at the agreed, legal sale price per pound;* but that upon delivery the buyer weighed the shipments and found them to be of lesser weights than ordered and as invoiced. (R. 76-77, 78, 72).

The Administrator offered no proof whatsoever that prior to this suit petitioners *knew* the weights of the fryers received by the purchaser were less than the weights shipped and invoiced, *nor that petitioners knowingly, purposely or intentionally billed the purchaser for greater weights than were received.*

Admittedly, petitioners were not notified, either by the purchaser or by the Administrator, of the alleged receipt of the lesser weights before the filing of this penalty suit; and that immediately upon learning of the buyer's claim that lesser weights were received, petitioners mailed invoices for those weights *at the agreed, legal price per pound,* refused to accept a check from the buyer for the amount of the original invoices, but subsequently received and accepted payment for the weights claimed to have been received by the purchaser *at the agreed, legal rate per pound.* (R. 84-85, 87, 81-82, 57, 63).

When the Administrator rested his case, petitioners moved for an instructed verdict on the ground that the proof failed to show any violation as charged (R. 139). The motion was overruled and exception taken.

Petitioners proved they operate a large concern, having many departments and doing a large monthly business (R. 140-141, 145); that petitioners had

no particular knowledge of these orders and shipments except as reflected by their office records (R. 145, 147); that the orders were received, filled and shipped by petitioners in the regular course of business (R. 142-143); and that petitioners' office records and the Express Company's Bill of Lading show shipments of the weights of poultry ordered by the purchaser (R. 156-157, 158); and that, accordingly, invoices for those weights *at the agreed, legal charge per pound* were mailed to the buyer (R. 61, 142); that petitioners first learned of the claim that buyer received *lesser* weights when this suit was filed (R. 150, 147); whereupon petitioners mailed invoices for the weights claimed to have been received by the purchaser *at the agreed, legal charge per pound* (R. 151-152), refused to accept payment in the amount of the original invoices, but subsequently received and accepted payment for the number of pounds claimed to have been received by the purchaser *at the agreed, legal price per pound* (R. 152).

When the case was concluded, petitioners moved for an instructed verdict, but the motion was overruled and exception taken (R. 167).

Prior to submission of the court's charge to the jury, petitioners requested the submission of special issues for the jury to find whether petitioners charged the purchaser in excess of the legal price per pound for the poultry; whether or not petitioners willfully or knowingly delivered less weights of poultry than invoiced with the intent to charge and collect a price in excess of the maximum legal price per pound; whether or not when petitioners

billed the purchaser by the original invoices, petitioners knew a shortage existed in the poultry shipped to and received by the purchaser; and to find what quantity of poultry was knowingly and intentionally delivered by petitioners to the buyer. (R. 13-25). The requested issues were refused by the court and exceptions taken. (R. 13-25).

The court charged the jury that the alleged violations were not by virtue of excessive charges on a per pound basis, but *if any violations were committed, this was by reason of shortage of weight in the deliveries to the purchaser.* (R. 170-171). Only eight special issues were submitted, composed of four inquiries relating to each of the two shipments:

> (1) Whether petitioners *delivered* less than the specified weights in the original invoices (R. 172-173, 176);
>
> (2) The number of pounds *delivered* in each shipment (R. 173, 176-177);
>
> (3) Whether the *deliveries* of such lesser weights were not willful (R. 174, 177); and
>
> (4) Whether the *deliveries* of such lesser weights were not the result of petitioners' failure to take practicable precautions "against the occurrence of the violations," if the jury "found that there was a violation." (R. 175-176, 178).

Petitioners properly objected and excepted to the court's charge to the jury because of the failure to submit the issues requested by petitioners, because the court failed to submit any issue to find whether

petitioners knowingly shipped and delivered less weights than those charged in the invoices to the buyer, and because the court failed to submit any issue for the jury to find whether petitioners knowingly charged the buyer for the weights invoiced with knowledge that lesser weights had been shipped and delivered to the buyer (R. 28-32).

The jury's answers to the issues submitted found:

(1) That petitioners *delivered* less weights of poultry than contained in the invoices. (R. 32, 35).

(2) The actual weights *delivered and received* by the purchaser. (R. 33, 36).

(3) *That petitioners did not willfully deliver less weights than invoiced* (R. 33-34, 36-37), and

(4) That such *deliveries* of lesser weights were not the result of petitioners' failure to take practicable precautions (R. 34-35, 37-38).

Petitioners moved for judgment upon the answers of the Jury to Special Issues Nos. 3, 4, 7, and 8 *(that the deliveries of lesser weights were not willful, nor the result of a failure to take practicable precautions)*, the grounds being that these answers constituted a finding that no violations had been committed by petitioners as charged (R. 39-42). The motion was overruled, and petitioners excepted (R. 186-187).

The District Court entered judgment for the Administrator, assessing against petitioners a single

penalty for the amount of the alleged overcharges (R. 42-49); and an appeal was duly perfected to the United States Circuit Court of Appeals, Fifth Circuit, which affirmed the Distrct Court judgment by *per curiam* opinion rendered December 2, 1947.

Questions Presented

1.

Whether it is a violation of an OPA Maximum Price Regulation and the Emergency Price Control Act for a vendor to sell, ship and invoice the buyer for a quantity of merchandise *at an agreed, legal price*, if upon delivery the buyer actually receives a lesser quantity of merchandise *without the seller's knowledge of the shortage.*

2.

Whether it is a violation of an OPA Maximum Price Regulation and the Emergency Price Control Act for a vendor to sell, ship, and invoice the buyer for a quantity of merchandise *at an agreed, legal price*, but there is an unintentional, inadvertent, accidental or mistaken delivery to the buyer of a lesser quantity than invoiced *without the knowledge or fault of the seller.*

3.

Whether proof that a vendor sold, shipped and invoiced the buyer for a quantity of merchandise

at an agreed, legal price, and that a lesser quantity of merchandise was actually received by the buyer *without the seller knowing of the shortage when invoices were sent to the buyer*, is sufficient to show a violation of an OPA Maximum Price Regulation and the Emergency Price Control Act.

4.

Whether the burden of proof upon the Administrator to show a violation of an OPA Maximum Price Regulation and the Emergency Price Control Act through sale, delivery or charge for merchandise at a price in excess of the maximum price is discharged by proof that a vendor shipped and invoiced the buyer for a quantity of merchandise *at an agreed, legal price*, but that a lesser quantity of merchandise was actually received by the buyer *without the seller's knowledge of the shortage.*

5.

Whether, in a penalty suit for alleged violation of an OPA Maximum Price Regulation and the Emergency Price Control Act, the District Judge, upon proper request, should submit an issue to the jury to find whether or not the alleged overcharge and violation was committed.

6.

Whether a jury finding that a vendor, who sold, shipped and invoiced the buyer for a quantity of

merchandise *at an agreed, legal price*, did not willfully or carelessly deliver a lesser quantity to the buyer than invoiced constitutes a finding that the seller did not violate an OPA Maximum Price Regulation and the Emergency Price Control Act by selling, delivering or charging for the merchandise at a price in excess of the maximum price.

Specifications of Error

The Circuit Court of Appeals erred in the following respects:

1.

In affirming the District Court judgment, because the Administrator failed to prove that petitioners violated the OPA Maximum Price Regulation herein by selling, delivering or charging for poultry at a price in excess of the maximum price therefor.

2.

In affirming the District Court judgment herein, because the jury did NOT find that petitioners violated the OPA Maximum Price Regulation herein by selling, delivering or charging for poultry at a price in excess of the maximum price therefor.

3.

In affirming the District Court judgment herein, because the jury in answer to Special Issues Nos. 3 and 7 found that petitioners did not knowingly

deliver less amounts of poultry than invoiced, and thus the jury necessarily found that petitioners did not violate the OPA Maximum Price Regulation herein.

4.

In affirming the District Court judgment herein, because the trial court erred in failing to submit any issue for the jury to find whether petitioners violated the OPA Maximum Price Regulation herein by selling, delivering or charging for poultry at a price in excess of the maximum price therefor.

5.

In affirming the District Court judgment herein, because the trial court erred in failing to submit any issue to the jury to find whether petitioners knowingly shipped less amounts of poultry than invoiced with intent to charge or collect a price in excess of the maximum price therefor.

6.

In holding: "The defense was a denial of a violation *in* that the overcharge, if any occurred, was not willful or intentional nor was it the result of a failure to take practicable precautions against the occurrence of a violation," because petitioners pleaded: (a) that the complaint failed to state a cause of action, because no willful, intentional or knowing act of petitioners was alleged; (b) that *no violation of any OPA regulation, order or price*

schedule had been committed by any action or conduct of petitioners; and (c) that *if* any violation had occurred, it was not willful nor the result of a failure to take practicable precautions against the occurrence of a violation (R. 5-7, 12-13).

7.

In holding there was evidence "that the amount charged for the poultry was in excess of the ceiling price," because the Administrator did not prove that petitioners knowingly shipped or delivered less amounts of poultry than invoiced, nor that petitioners intended to invoice, charge or collect for a greater amount of poultry than was shipped or delivered and thus charge or collect a price in excess of OPA maximum price therefor.

8.

In holding that "the jury returned a verdict on special issues finding: (1) that the *shipments* were short in weight," because the jury found only that there was *delivered to the mess* less amounts of poultry than invoiced (R. 172-173, 176).

9.

In holding that "defendants moving for judgment on this verdict, insisted that since the jury had acquitted the defendants both of willfulness and want of care, defendants should have had judgment," because petitioners moved for instructed verdict after

the Administrator had rested the case, and moved for instructed verdict after close of the testimony, on the ground that *as a matter of law* no violation had been proved by the Administrator; and petioners moved for judgment upon the jury's findings to Special Issues Nos. 3 and 7, because the jury found that no violation had been committed in that the jury found that petitioners did *not* knowingly or with wrongful purpose deliver less amounts of poultry than invoiced.

10.

In holding "it is just as much an overcharge to bill a shipment at the correct price per pound with the poundage short as to bill the shipment at a price per pound above ceiling would be," because an unintentional, inadvertent, accidental or mistaken shipment of a lesser poundage than invoiced does not constitute a sale, delivery or overcharge in violation of the OPA Maximum Price Regulation herein.

11.

In holding that the jury's verdict "did not furnish any basis for denying recovery. Indeed, it furnished the basis for the judgment entered. It found that *the shipment* was short by a number of pounds," because the jury found (a) that the weights of poultry *delivered* to and received by the Mess were less than the invoiced weights; (b) that the *delivery* of such weights was not done knowingly or with wrongful purpose; and, therefore, necessarily found

(c) that *petitioners did not knowingly or intentionally invoice for greater weights than delivered;* thus, the jury necessarily found that petitioners did not sell, deliver or charge for poultry at a price in excess of OPA maximum price therefor.

12.

In affirming the District Court judgment herein, because the Court found from the undisputed proof herein that petitioners sold the poultry herein *at the legal price of 45¢ per pound* and invoiced for the poultry *at the legal price of 45¢ per pound* and did not sell, invoice or charge for the poultry by the box, package or individual chicken.

Each of the foregoing Specifications of Error was properly raised and presented in the Circuit Court of Appeals.

Reasons for Granting the Writ

1. The opinion of the Circuit Court of Appeals holds that "it is just as much an overcharge to bill a shipment at the correct price per pound with the poundage short as to bill the shipment at a price per pound above ceiling would be." The necessary effect of this ruling is to give encouragement to the Office of Price Administration to institute countless penalty suits for alleged violations of OPA Maximum Price Control Regulations and the Emergency Price Control Act in every instance where a vendor has sold merchandise *at a lawful price* but there has been an unintentional, inadvertent, mis-

taken, or accidental delivery of a lesser quantity to the buyer, *whether or not the vendor was at fault or had knowledge of the shortage.*

Thus the rulings of the Circuit Court of Appeals in its opinion constitute a flagrant and untenable departure from entrenched principles of law applicable to suits for penalties which are of peculiar gravity and importance to the public generally because of the wide scope of the authority vested in the Office of Price Administration.

2. The Circuit Court of Appeals has decided an important question of Federal law which has not been but should be settled by the Supreme Court, in holding that a seller who sells, ships and invoices a buyer for a quantity of merchandise at an agreed, legal price is guilty of a violation of an OPA Maximum Price Regulation and the Emergency Price Control Act *if, through loss in transit, or by inadvertence, mistake, or accident, there occurs an unintentional delivery to the buyer of a lesser quantity of merchandise than invoiced by the seller.*

3. The ruling of the Circuit Court of Appeals, that it is just as much an overcharge to bill a shipment at the correct price per pound with the poundage (*unintentionally or unknowingly*) short as it would be to bill the shipment at a price per pound above the ceiling price, is probably in conflict with decisions of other Circuit Courts of Appeals.

In *United States vs. Steiner*, (C. C. A. 7) 152 F. (2d) 484, 487, the complaint charged violation of OPA ceiling prices by tractor sales, and the defense

was that a bona fide lease transaction had occurred; and the Court held a question of fact was presented to determine *whether a good faith lease existed* or a device occurred *knowingly, intentionally and willfully* to evade the statute and price regulation.

In *Zimburg vs. United States,* (C. C. A. 1) 142 F. (2d) 132, the defendant was charged with violations through evasions and subterfuge, and the Court affirmed conviction because the evidence showed defendant *knowingly* had used a scheme, method and practice to evade the price regulations.

In *Bowles vs. Arlington,* (C. C. A. 7) 148 F. (2d) 467, a dealer through auctioneers sold used machinery as rebuilt and guaranteed, and the Circuit Court reversed the case as to the auctioneers because the evidence was insufficient to show that the auctioneers had *knowledge* the machines were not rebuilt and guaranteed when sold as such.

And such holding is probably in conflict with decisions of the Federal District Courts in *Bowles vs. Assad,* (D .C. Penn.) 56 Fed. Sup. 8, in which a broker handling a shipment of steel scrap *in good faith and without knowledge* of the content was held not to have violated a price regulation; and in *Brown vs. Banana Distrib. of America,* (D. C. Conn.) 52 Fed. Sup. 804, where it was held that to show a violation of OPA ceiling prices in a complaint charging violation by a tying-in agreement as a means of evasion, it must be made to appear *that the practice was so used* to justify a violation of the Act; and in *Bowles vs. Cunningham,* (D. C. Penn.) 61 Fed. Sup. 162, where it was held that

in the absence of a conclusive showing that defendants *knowingly* violated the price regulation by exceeding ceiling prices no injunction would issue, as defendant *having no knowledge* of the transportation costs was not properly chargeable with exceeding the ceiling price.

4. The rulings and errors of the Circuit Court of Appeals in this case are patently and grossly unjust to petitioners, who have been adjudged guilty of violating the OPA Maximum Price Regulation and the Emergency Price Control Act by charging excess prices for poultry despite the *uncontradicted* evidence that petitioners sold and the purchasers bought the poultry *at a legal price per pound*, that petitioners invoiced the buyer for the poultry *at a legal price per pound*, that the petitioners shipped to the buyer, by common carrier, the weights of poultry for which invoices were sent the buyer, and that the deliveries to the buyer of lesser weights than invoiced *were without the knowledge of petitioners;* and the jury found petitioners *neither willfully nor carelessly delivered such lesser weights.*

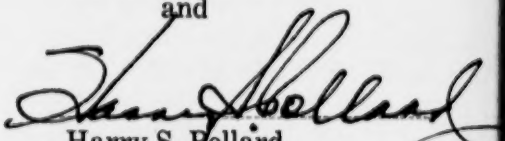
The penalty assessed against petitioners is trivial (amounting only to $156.85), the subsequent court costs in this suit being several times greater than the penalty; but the principle involved in this case is not only of general importance to the OPA-governed and regulated public, but is also of infinite importance to petitioners because this conviction for alleged violation of maximum price regulations is of incalculable damage to the good reputation of the long-established business of petitioners, through

the resulting stigma of the conviction of having engaged in black-market sales.

Conclusion

Petitioners respectfully pray that a Writ of Certiorari issue in this case to the end that the judgments of the Circuit Court of Appeals and the District Court may be reviewed, the judgments of the courts below reversed, and that judgment be rendered in favor of petitioners; and for general relief.

SMITH and POLLARD
W. R. Smith, Jr.
and



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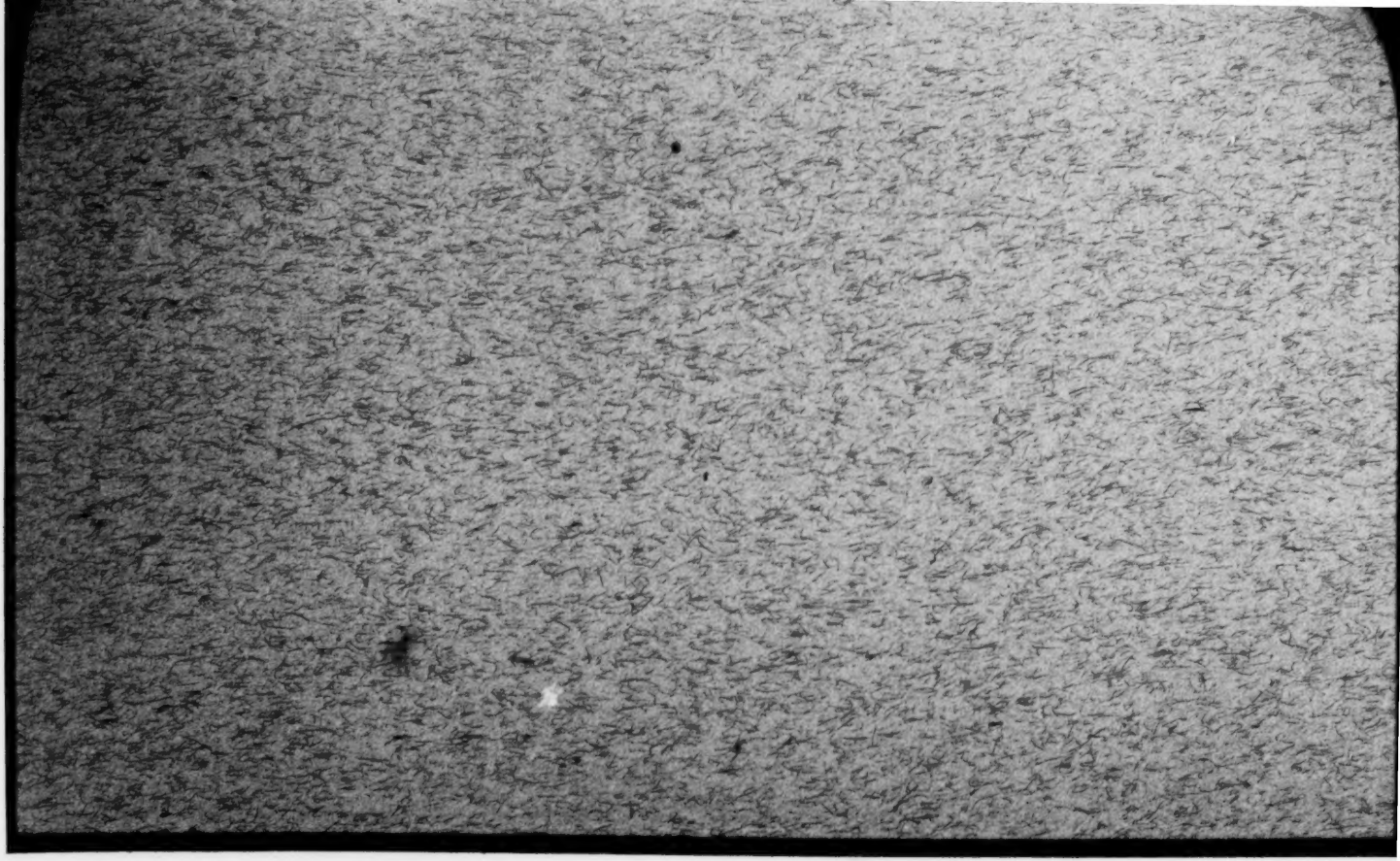

SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction	2
Summary Statement	2-8
Specifications of Error	8-12
Argument	12-37
Summary of the Argument	12-14
First Point—It is not a violation of the Emergency Price Control Act or of the O.P.A. Maximum Price Regulation herein for a vendor to sell, ship and invoice a buyer for a quantity of merchandise, by weight, at an agreed legal price per pound, but through inadvertence, mistake, or accident there is an unintentional delivery of lesser weights to the buyer without knowledge or fault of the seller	14-21
Second Point—The Administrator failed to prove that petitioners violated the Emergency Price Control Act and the O.P.A. Maximum Price Regulation herein by selling or delivering poultry at prices in excess of the maximum fixed price, since petitioners admittedly sold, and the buyer bought, the poultry by weight, at an agreed legal price per pound, and there was no proof that petitioners intended or knew of delivery of lesser weights than invoiced	21-28

Page

Third Point—Whether or not petitioners violated the Emergency Price Control Act and the O.P.A. Maximum Price Regulation herein, by selling or delivering poultry at prices in excess of the maximum fixed price, was a fact issue which should have been submitted to the jury, and the timely request of petitioners for the specific submission of such issue should have been granted by the trial court 28-33

Fourth Point—The jury necessarily found, in answers to Special Issues Nos. 3 and 7, that petitioners did NOT violate the Emergency Price Control Act and the O.P.A. Maximum Price Regulation herein by selling and delivering poultry at prices in excess of the O.P.A. maxmium fixed price, since the jury found that petitioners did not wilfully or knowingly deliver less weights of poultry than invoiced 33-37

Conclusion 37

Signature of Counsel 38

INDEX OF AUTHORITIES

	Page
Barnes vs. Bowles, (C.C.A. 5), 157 Fed. (2d) 790	15, 25
Bowles vs. Arlington, (C.C.A. 7), 148 Fed. (2d) 467	26
Bowles vs. Assad, (D.C. Penn.), 56 F. Sup. 8	26
Bowles vs. Beatrice Creamery Co., (D.C. Wyo.), 56 F. Sup. 805	15
Bowles vs. Cohn, (D.C. N.Y.), 57 F. Sup. 306	25
Bowles vs. Cummins Dist. Corp, (D.C. Ky.), 56 F. Sup. 941, 942	15
Bowles vs. Cunningham, (D.C. Penn.), 61 F. Sup. 162	26
Bowles vs. Goebel, (C.C.A. 8), 151 Fed. (2d) 671, 675	31
Bowles vs. Griffin, (C.C.A. 5), 151 Fed. (2d) 458, 460	15
Bowles vs. Hansen Packing Co., (D.C. Mont.), 64 F. Sup. 131	25, 31
Bowles vs. Hastings, (C.C.A. 5), 146 Fed. (2d) 94	18
Bowles vs. Indianapolis Glove Co., (C.C.A. 7), 150 Fed. (2d) 597	19
Bowles vs. Lenko, (D.C. Penn.), 64 F. Sup. 592	15
Bowles vs. Montgomery Ward & Co., (C.C.A. 7), 143 Fed. (2d) 38, 43	15
Bowles vs. Nasif, (D.C. La.), 58 F. Sup. 644	15
Bowles vs. Silverman, (D.C. S.D.), 57 F. Sup. 990	15
Bowles vs. Trowbridge, (D.C. Cal.), 60 F. Sup. 48	15
Brown vs. Banana Dist. of America, (D.C. Conn.), 52 F. Sup. 804	26
Brown vs. Glick Bros. Lbr. Co. (D.C. Cal.), 52 F. Sup. 913	15
Brown vs. Mars, Inc., (C.C.A. 8), 135 Fed. (2d) 843	20
Brown vs. Quinlan, (C.C.A. 7), 138 Fed. (2d) 228	31
Brown vs. Schagrin, (D.C. Del.), 64 F. Sup. 345	28
Comm. of Internal Revenue vs. Friehofer, (C.C.A. 3), 102 Fed. (2d) 787, 789, 790, 125 A.L.R. 761	16
Flannigan vs. U. S., (C.C.A. 9), 154 Fed. (2d) 740	31
Greely vs. Thompson, 51 U. S. 225, 10 How. 225, 13 L. Ed. 397	28
Henderson vs. Beaird, (D.C. La.), 48 F. Sup. 252	25
Henderson vs. Glosser (D.C. Penn.), 46 F. Sup. 460	16, 26
Kenney vs. Hood, (C.C.A. 5), 158 Fed. (2d) 226	19
Link vs. Kallaos, (D.C. Mo.), 56 F. Sup. 304	16

Page

Porter vs. Hoffman, (D.C. Cal.), 65 F. Sup. 492 28

Shearer vs. Porter, (C.C.A. 8), 155 Fed. (2d) 77 ..... 19, 31

No. 431 Testa vs. Katt, decided Mar. 10, 1947, 91 L. Ed. 776, 777 15

U. S. vs. Lutz, (C.C.A. 3), 142 Fed. (2d) 985 31

U. S. vs. Steiner (C.C.A. 7), 152 Fed. (2d) 484, 487 27

Zimburg vs. United States, (C.C.A. 1), 142 Fed. (2d) 132 27

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Emergency Price Control Act of 1942, as amended, Sec. 4(a) 3

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No opinion was written by the United States District Judge.

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Petition for Writ of Certiorari was docketed in this Court on April 7, 1947.

Summary Statement

Complaint was filed by the Administrator, Office of Price Administration, under Section 205 (e) of the Emergency Price Control Act of 1942, as amended, (Pub. Law 421, 77th Cong., 2nd Sess., 56 Stat. 23, 765, 57 Stat. 566, Pub. Law 383, 78th Cong.) against petitioners, seeking treble damages as a pen-

alty for alleged violtaions of Section 4 (a) of said Act, arising from alleged overcharges for two sales and deliveries of dressed poultry in excess of ceiling prices fixed by Second Revised Maximum Price Regulation No. 269, as amended. (R. 1-5).

The essence of the complaint was that petitioners sold and delivered a purported quantity by weight of dressed poultry *at a legal price charged per pound*, but that a lesser quantity was actually delivered and received by the buyer, and by reason of "delivery of short weights" the shipment invoices constituted actual overcharges per pound. (R. 9-11).

Petitioners answered that:

(a) The complaint was insufficient and failed to state a cause of action, because it did not allege the acts charged were willfully, intentionally, or knowingly committed by petitioners (R. 12);

(b) Petitioners were not guilty of any act or conduct in violation of the regulation order or price schedule (R. 13);

(c) If any violation had occurred, it was not willful, nor the result of a failure to take practicable precautions against its occurrence (R. 13).

In open court counsel for the Administrator recognized the necessity of proving the alleged violations occurred by reason of *intentional*, *purposeful*, or *knowing acts* of petitioners, stating: "I think

we are certainly allowed to bring in testimony in this case *to show a system and a conspiracy to short weight.*" (R. 115).

The Administrator proved only that the buyer ordered, petitioners sold, and the buyer bought a specified number of pounds of dressed poultry *at a legal price per pound* (R. 71-72, 55); that petitioners shipped, by a public common carrier, the number of pounds ordered by the purchaser, and invoiced the purchaser for that poundage *at the agreed, legal sale price per pound;* but that upon delivery the buyer weighed the shipments and found them to be of lesser weights than ordered and as invoiced. (R. 76-77, 78, 72).

The Administrator offered no proof whatsoever that prior to this suit petitioners *knew* the weights of the fryers received by the purchaser were less than the weights shipped and invoiced, *nor that petitioners knowingly, purposely or intentionally billed the purchaser for greater weights than were received.*

Admittedly, petitioners were not notified, either by the purchaser or by the Administrator, of the alleged receipt of the lesser weights before the filing of this penalty suit; and that immediately upon learning of the buyer's claim that lesser weights were received, petitioners mailed invoices for those weights *at the agreed, legal price per pound,* refused to accept a check from the buyer for the amount of the original invoices, but subsequently received and accepted payment for the weights claimed to have been received by the purchaser *at the agreed, legal rate per pound.* (R. 84-85, 87, 81-82, 57, 63).

When the Administrator rested his case, petition-

ers moved for an instructed verdict on the ground that the proof failed to show any violation as charged (R. 139). The motion was overruled and exception taken.

Petitioners proved they operate a large concern, having many departments and doing a large monthly business (R. 140-141, 145); that petitioners had no particular knowledge of these orders and shipments except as reflected by their office records (R. 145, 147); that the orders were received, filled and shipped by petitioners in their regular course of business (R. 142-143); and that petitioners' office records and the Express Company's Bill of Lading show shipments of the weights of poultry ordered by the purchaser (R. 156-157, 158); and that, accordingly, invoices for those weights *at the agreed, legal charge per pound* were mailed to the buyer (R. 61, 142); that petitioners first learned of the claim that buyers received *lesser* weights when this suit was filed (R. 150, 147); whereupon petitioners mailed invoices for the weights claimed to have been received by the purchaser *at the agreed, legal charge per pound* (R. 151-152), refused to accept payment in the amount of the original invoices, but subsequently received and accepted payment for the number of pounds claimed to have been received by the purchaser *at the agreed, legal price per pound* (R. 152).

When the case was concluded, petitioners moved for an instructed verdict, but the motion was overruled and exception taken (R. 167).

Prior to submission of the court's charge to the jury, petitioners requested the submission of special

issues for the jury to find whether petitioners charged the purchaser in excess of the legal price per pound for the poultry; whether or not petitioners willfully or knowingly delivered less weights of poultry than invoiced with the intent to charge and collect a price in excess of the maximum legal price per pound; whether or not when petitioners billed the purchaser by the original invoices, petitioners knew a shortage existed in the poultry shipped to and received by the purchaser; and to find what quantity of poultry was knowingly and intentionally delivered by petitioners to the buyer. (R. 13-25). The requested issues were refused by the court and exceptions taken. (R. 13-25).

The court charged the jury that the alleged violations were not by virtue of excessive charges on a per pound basis, but *if any violations were committed, this was by reason of shortage of weight in the deliveries to the purchaser.* (R. 170-171). Only eight special issues were submitted, composed of four inquiries relating to each of the two shipments:

(1) Whether petitioners *delivered* less than the specified weights in the original invoices (R. 172-173, 176);

(2) The number of pounds *delivered* in each shipment (R. 173, 176-177);

(3) Whether the *deliveries* of such lesser weights were not willful (R. 174, 177); and

(4) Whether the *deliveries* of such lesser weights were not the result of petitioners'

failure to take practicable precautions "against the occurrence of the violations," if the jury "found that there was a violation." (R. 175-176, 178).

Petitioners properly objected and excepted to the court's charge to the jury because of the failure to submit the issues requested by petitioners, because the court failed to submit any issue to find whether petitioners knowingly shipped and delivered less weights than those charged in the invoices to the buyer, and because the court failed to submit any issue for the jury to find whether petitioners knowingly charged the buyer for the weights invoiced with knowledge that lesser weights had been shipped and delivered to the buyer (R. 28-32).

The jury's answers to the issues submitted found:

(1) That petitioners *delivered* less weights of poultry than contained in the invoices. (R. 32, 35);

(2) The actual weights *delivered and received by the purchaser.* (R. 33, 36);

(3) *That petitioners did not willfully deliver less weights than invoiced.* (R. 33-34, 36-37); and

(4) That such *deliveries* of lesser weights were not the result of petitioners' failure to take practicable precautions. (R. 34-35, 37-38).

Petitioners moved for judgment upon the answers of the Jury to Special Issues Nos. 3, 4, 7, and 8 *(that the deliveries of lesser weights were not willful, nor the result of a failure to take practicable precautions)*, the grounds being that these answers constituted a finding that no violations had been committed by petitioners as charged (R. 39-42). The motion was overruled, and petitioners excepted (R. 186-187).

The District Court entered judgment for the Administrator, assessing against petitioners a single penalty for the amount of the alleged overcharges (R. 42-49); and an appeal was duly perfected to the United States Circuit Court of Appeals, Fifth Circuit, which affirmed the District Court judgment by *per curiam* opinion rendered December 2, 1947.

Specification of Errors

The Circuit Court of Appeals erred in the following respects:

1.

In affirming the District Court judgment, because the Administrator failed to prove that petitioners violated the OPA Maximum Price Regulation herein by selling, delivering or charging for poultry at a price in excess of the maximum price therefor.

2.

In affirming the District Court judgment herein, because the jury did NOT find that petitioners vio-

lated the OPA Maximum Price Regulation herein by selling, delivering or charging for poultry at a price in excess of the maximum price therefor.

3.

In affirming the District Court judgment herein, because the jury in answer to Special Issues Nos. 3 and 7 found that petitioners did not knowingly deliver less amounts of poultry than invoiced, and thus the jury necessarily found that petitioners did not violate the OPA Maximum Price Regulation herein.

4.

In affirming the District Court judgment herein, because the trial court erred in failing to submit any issue for the jury to find whether petitioners violated the OPA Maximum Price Regulation herein by selling, delivering or charging for poultry at a price in excess of the maximum price therefor.

5.

In affirming the District Court judgment herein, because the trial court erred in failing to submit any issue to the jury to find whether petitioners knowingly shipped less amounts of poultry than invoiced with intent to charge or collect a price in excess of the maximum price therefor.

6.

In holding: "The defense was a denial of a violation *in* that the overcharge, if any occurred, was

not willful or intentional nor was it the result of a failure to take practicable precautions against the occurrence of a violation," because petitioners pleaded: (a) that the complaint failed to state a cause of action, because no willful, intentional or knowing act of petitioners was alleged; (b) that *no violation of any OPA regulation, order or price schedule had been committed by any action or conduct of petitioners;* and (c) that *if* any violation had occurred, it was not willful nor the result of a failure to take practicable precautions against the occurrence of a violation (R. 5-7, 12-13).

7.

In holding there was evidence "that the amount charged for the poultry was in excess of the ceiling price," because the Administrator did not prove that petitioners knowingly shipped or delivered less amounts of poultry than invoiced, nor that petitioners intended to invoice, charge or collect for a greater amount of poultry than was shipped or delivered and thus charge or collect a price in excess of OPA maximum price therefor.

8.

In holding that "the jury returned a verdict on special issues finding: (1) that the *shipments* were short in weight," because the jury found only that there was *delivered to the mess* less amounts of poultry than invoiced (R. 172-173, 176).

9.

In holding that "defendants moving for judgment on this verdict, insisted that since the jury had acquited the defendants both of willfulness and want of care, defendants should have had judgment," because petitioners moved for instructed verdict after the Administrator had rested the case, and moved for instructed verdict after close of the testimony, on the ground that *as a matter of law* no violation had been proved by the Administrator; and petitioners moved for judgment upon the jury's findings to Special Issues Nos. 3 and 7, because the jury found that no violation had been committed in that the jury found that petitioners did *not knowingly* or with wrongful purpose deliver less amounts of poultry than invoiced.

10.

In holding "it is just as much an overcharge to bill a shipment at the correct price per pound with the poundage short as to bill the shipment at a price per pound above ceiling would be," because an unintentional, inadvertent, accidental or mistaken shipment of a lesser poundage than invoiced does not constitute a sale, delivery or overcharge in violation of the OPA Maximum Price Regulation herein.

11.

In holding that the jury's verdict "did not furnish any basis for denying recovery. Indeed, it furnished the basis for the judgment entered. It found

that *the shipment* was short by a number of pounds," because the jury found (a) that the weights of poultry *delivered* to and received by the Mess were less than the invoiced weights; (b) that the *delivery* of such weights was not done knowingly or with wrongful purpose; and, therefore, necessarily found (c) that *petitioners did not knowingly or intentionally invoice for greater weights than delivered;* thus, the jury necessarily found that petitioners did not sell, deliver or charge for poultry at a price in excess of OPA maximum price therefor.

12.

In affirming the District Court judgment herein, because the Court found from the undisputed proof herein that petitioners sold the poultry herein *at the legal price of 45¢ per pound* and invoiced for the poultry *at the legal price of 45¢ per pound* and did not sell, invoice or charge for the poultry by the box, package or individual chicken.

Each of the foregoing Specifications of Error was properly raised and presented in the Circuit Court of Appeals.

ARGUMENT

Summary of the Argument

1. Suits authorized by Section 205 (e) of the Emergency Price Control Act of 1942, as amended, against any person selling a commodity in violation

of any O. P. A. Maximum Price Regulation for recovery of treble the amount of the overcharge, are civil suits, quasi-criminal in nature, for the recovery of penalties; and a strict construction is required of alleged violative acts.

2. The term "selling" in the Act is synonomous with "sale," and has the usual significance of that term, meaning "an *agreement* whereby the seller transfers property and goods to the buyer for a consideration called the price; a contract by which property is transferred from the seller to the buyer *for a fixed price in money*, paid or agreed to be paid by the buyer"; and necessarily connotes *knowing and voluntary* action by the seller.

3. It is NOT a violation of the Emergency Price Control Act or of the O. P. A. Maximum Price Regulation herein for a vendor to sell, ship and invoice a buyer for a quantity of merchandise, *by weight, at an agreed, legal price per pound*, but through *inadvertence, mistake, or accident* there is an *unintentional* delivery of lesser weights to the buyer, *without knowledge or fault of the seller.*

4. In suits by the Administrator of the Office of Price Administration under Section 205 (e) of the Emergency Price Control Act of 1942, as amended, the burden rests upon the Administrator to prove the alleged violation by a preponderance of the evidence.

5. The Administrator failed to prove that petitioners violated the Emergency Price Control Act

and the O. P. A. Maximum Price Regulation herein by selling or delivering poultry at prices in excess of the maximum fixed price, since petitioners admittedly sold, and the buyer bought, the poultry *by weight, at an agreed, legal price per pound,* and there was NO proof that petitioners intended or *knew of* delivery of lesser weights than invoiced.

6. Whether or not petitioners violated the Emergency Price Control Act and the O. P. A. Maximum Price Regulation herein, by selling or delivering poultry at prices in excess of the maximum fixed price, was a fact issued which should have been submitted to the jury, and the timely request of petitioners for the specific submission of such issue should have been granted by the trial court.

7. The jury necessarily found, in answers to Special Issues Nos. 3 and 7, that petitioners did NOT violate the Emergency Price Control Act and the O. P. A. Maximum Price Regulation herein by selling and delivering poultry at prices in excess of the O. P. A. maximum fixed price, since *the jury found that petitioners did not willfully or knowingly deliver less weights of poultry than invoiced.*

First Point

It is not a violation of the Emergency Price Control Act or of the O.P.A. Maximum Price Regulation herein for a vendor to sell, ship and invoice a buyer for a quantity of merchandise, by weight, at an agreed, legal price per pound, but through inad-

vertence, mistake, or accident there is an unintentional delivery of lesser weights to the buyer without knowledge or fault of the seller.

While the United States Supreme Court has not yet specifically decided the question (See No. 431 *Testa vs. Katt*, decided March 10, 1947, 91 L. Ed. 776, 777), it appears that the opinion of the weight of lower court authorities is that suits authorized by *Section* 205 (e) of the *Emergency Price Control Act of 1942*, as amended, against any person selling a commodity in violation of an O. P. A. Maximum Price Regulation for recovery of treble the amount of the overcharge, are civil suits which are quasi-criminal in nature for the punishment of violators through the recovery of penalties, either by the Administrator or by the injured buyer; and a strict construction is required of all alleged violative acts. *Bowles vs. Griffin* (C. C. A. 5), 151 Fed. (2d) 458, 460; *Barnes vs. Bowles*, (C. C. A. 5), 157 Fed. (2d) 790; *Bowles vs. Montgomery Ward & Co.*, (C. C. A. 7), 143 Fed. (2d) 38, 43; *Brown vs. Glick Bros. Lbr. Co.*, (D. C. Cal.), 52 F. Sup. 913; *Bowles vs. Beatrice Creamery Co.*, (D. C. Wyo.), 56 F. Sup. 805; *Bowles vs. Cummins Dist. Corp.*, (D. C. Ky), 56 F. Sup. 941, 942; *Bowles vs. Silverman*, (D. C. S. D.), 57 F. Sup. 990; *Bowles vs. Nasif*, (D. C. La.), 58 F. Sup. 644; *Bowles vs. Trowbridge*, (D. C. Cal.), 60 F. Sup. 48; *Bowles vs. Lenko*, (D. C. Penn.), 64 F. Sup. 592.

The term "selling" in the Act is synonymous with "sale," and has the usual significance of that term, meaning "*an agreement* whereby the seller transfers property and goods to the buyer *for a consideration*

called the price; a contract by which property is transferred from the seller to the buyer *for a fixed price in money, paid or agreed to be paid by the buyer,*" *Link vs. Kallaos,* (D. C. Mo.), 56 F. Sup. 304; *Henderson vs. Glosser,* (D. C. Penn.), 46 F. Sup. 460; and necessarily connotes *knowing* and *voluntary* action by the seller. *Comm. of Internal Revenue vs. Friehofer,* (C. C. A. 3), 102 Fed. (2d) 787, 789, 790, 125 A. L. R. 761.

The term "overcharge" is defined in the Act to mean "the amount by which *the consideration* exceeds the applicable maximum price."

To effect a sale of property there must be *an agreement* between the seller and buyer concerning the terms and conditions of the transfer, usually including the nature and quantity of the property and the fixed amount of the consideration or sale price. To enable and constitute such *agreement* there must necessarily exist a mutual *knowledge* of and acquiesence in the elements and terms of the agreement.

Thus, the language of the Act patently evidences the intention of Congress to penalize a vendor solely for *a voluntary and knowing sale* or transfer of property *for an agreed price which is in excess of the O. P. A. maximum fixed price for the property.*

In an agreement between a seller and buyer for the transfer of a quantity of property *by weight* at an agreed, legal price *per pound,* paid or to be paid by the buyer, the consideration or sale price is *the agreed price per pound.* If a lesser weight than agreed is delivered to the buyer, *the consideration or sale price per pound remains unchanged,* as would be true if there was delivery of a greater weight than agreed. The fact that the seller bills or invoices

the buyer for the total agreed quantity, *by weight*, at the agreed price per pound, but the buyer is delivered a lesser weight, does not void or vary the terms of the agreed sale, nor create a sale of the lesser weight for the total of the agreed price of the greater weight. *The consideration remains the agreed, fixed price per pound.*

A fortiori when a vendor sells a buyer a quantity of merchandise *by weight* at an agreed, legal price per pound, invoicing the buyer for the total agreed weight at the agreed, legal price per pound, but through *inadvertence, mistake or accident* there is an *unintentional* delivery to the buyer of a lesser weight than invoiced, the terms and consideration of the original sale are not voided, nor is a new sale effected of the lesser weight at the consideration of the total of the agreed price of the greater weight.

The opinion of the Circuit Court of Appeals herein concludes that "It is just as much an overcharge to bill a shipment at the correct price per pound with the poundage short as to bill the shipment at a price per pound above ceiling would be." (R. 194); but by the terms of Section 205 (e) of the Act, an *overcharge* is the amount by which *the consideration of the sale* exceeds the applicable maximum price. Accordingly, there can be no *overcharge* unless there exis'ts *a sale*, for an agreed consideration exceeding the maximum fixed price. An inadvertent, accidental or unintentional shortage in a shipment pursuant to a sale of an agreed quantity of merchandise *by weight* at an agreed, lawful price *per pound* for which the buyer is billed by invoice, does not constitute a sale of the short weight at the total of the consideration for the greater weight, in

the absence of admission or proof that the seller and buyer had made such *agreement*, expressly or impliedly.

To paraphrase the ruling of the Circuit Court of Appeals, we concede that it may be "just as much an overcharge to bill a shipment at a correct price per pound with the poundage *intentionally or knowingly* short as it would be to bill the shipment at a price per pound above the ceiling price." In such instances, however, *the true sale would be of the lesser weight at the total price for the greater weight;* and the billing for the greater weight would be merely the subterfuge by which the true sale is sought to be camouflaged.

But an unintentional, mistaken, inadvertent or accidental delivery of a lesser quantity of merchandise than billed does not constitute a sale of the lesser quantity at the charge for the greater quantity; and mere proof of the shortage, without proof of the shipper's *knowledge* of the shortage, does not prove the sale, nor it is even *prima facie* proof of the sale.

The authorities cited in the opinion of the Circuit Court of Appeals in support of its opinion herein are not in point. In each of those cases the violation by sales at prices in excess of O. P. A. maximum fixed prices was admitted or proved beyond question, but good faith or lack of intent to violate were urged as *complete defenses.*

In Bowles vs. Hastings, (C. C. A. 5), 146 Fed. (2d) 94, the trial court found *sales were made at excess prices* but that the *violation* was not wilful, and refused to imposed a penalty. The Circuit Court held that *when an excess price is charged* the damage

is done and the Court has no discretion to withhold the imposition of the penalty, but if the defendant then proves *the violation* was neither wilful nor the result of failure to take practicable precautions against its occurrence, the penalty is reduced to the amount of the overcharge.

In *Bowles vs. Indianapolis Glove Co.*, (C. C. A. 7), 150 Fed. (2d) 597, violations were shown by sales *admittedly made at prices above the O. P. A. maximum price*, but in the belief that such sales conformed with the price regulations. The Circuit Court held that *since the violations were proved*, the good faith of the defendant was not a complete defense, but was to be considered only in reduction of the penalty.

In *Shearer vs. Porter*, (C. C. A. 8), 155 Fed. (2d) 77, the evidence showed conclusively that violations had occurred through *sales made at prices above O. P. A. ceiling prices*, and treble damages were assessed as mandatory. The Circuit Court held that *when a violation is shown*, the only question is the amount of penalty to be assessed, which defendant is entitled to have limited to the amount of overcharge if defendant proves *the violation* was not wilful nor the result of failure to take practicable precautions against its occurrence.

In *Kenney vs. Hood*, (C. C. A. 5), 158 Fed. (2d) 226, the defendant sold a refrigerator *at a price exceeding the O. P. A. fixed price* in the belief there was no ceiling price, and a single penalty assessed for the *admitted violation* upon a jury finding that the violation was neither wilful nor the result of failure to take practicable precautions. The Circuit Court held that the defenses of mutual mistake con-

cerning the existence of a ceiling price and the purchaser's fraud in failing to advise the seller of a ceiling price were not available because of the seller's failure to bring timely action to rescind the agreement.

In *Brown vs. Mars, Inc.*, (C. C. A. 8), 135 Fed. (2d) 843, Mars was charged with violation of the O. P. A. established price through the device of decreasing weights without reductions in the price charged for candy bars. The defense was that the candy was not sold by weight but by the bar, and that weight changes were occasioned by changes of formula and ingredients used without decrease in quality of the bar. The trial court found the weights of candy bars, sold packaged in boxes and cartons, were reduced without reduction in the fixed price of the bars, but refused to enjoin. The Circuit Court held that any decrease in weight of foods *sold by the piece or by the package* without a corresponding decrease in price has the same effect on the purchaser and on the seller as an increase in price, since less is sold for the same money. However, the Court further held that *any such decreases caused by innocent changes in formula or by innocent methods in manufacture, or both, are not violations of the Act*, defining "innocent" as meaning those decreases which do not result in circumvention or evasion of the maximum price.

The Mars case does not support the conclusions reached by the Circuit Court of Appeals herein; to the contrary, it supports our point that it is NOT a violation of the Emergency Price Control Act or of an O. P. A. Maximum Price Regulation for a vendor to sell, ship and invoice a buyer for a quan-

tity of merchandise, by weight, at an agreed, legal price *per pound*, if through *inadvertence, mistake or accident* there is an *unintentional* delivery of lesser weights to the buyer without knowledge or fault of the seller.

Second Point

The Administrator failed to prove that petitioners violated the Emergency Price Control Act and the O.P.A. Maximum Price Regulation herein by selling or delivering poultry at prices in excess of the maximum fixed price, since petitioners admittedly sold, and the buyer bought, the poultry by weight, at an agreed, legal price per pound, and there was no proof that petitioners intended or knew of delivery of lesser weights than invoiced.

The complaint was that petitioners purportedly sold and delivered a specified quantity *by weight* of dressed poultry *at a legal price per pound*, but that a lesser quantity was actually sold, delivered to and received by the buyer, and "by reason of delivery of short weights" the shipment invoices constituted actual overcharges per pound in violation of the O. P. A. regulation. (R. 9-11).

The Petitioners answered that they were not guilty of any act or conduct in violation of the O. P. A. regulation, order, or price schedule (R. 13); but that *if* any violation had occurred, it was not wilful nor the result of failure to take practicable precautions against its occurrence. (R. 13).

Trial was before a jury. (R. 54).

The Administrator recognized the necessity of proving the alleged violations occurred by reason of

intentional, purposeful or knowing acts of petitioners, his counsel stating: "I think we are certainly allowed to bring in testimony in this case *to show a system and a conspiracy to short weight.*" (R. 115).

It was stipulated that the ceiling price for the poultry was 46.68 cents per pound (R. 56).

The Administrator proved only that the buyer ordered and bought and petitioners sold a specified number of pounds of dressed poultry *by weight, at the agreed, legal price of 45¢ per pound* (R. 71-72); that petitioners shipped, by a public common carrier, the number of pounds ordered by the purchaser, invoicing the purchaser for that poundage *at the agreed, legal price per pound* (R. 56, 72), but that upon delivery the buyer weighed the shipments and found them to be of lesser weights than ordered and invoiced. (R. 76-78).

The Administrator offered no proof whatsoever that prior to the suit petitioners *knew* the weights of poultry received by the purchaser were less than the weights shipped and invoiced, nor that petitioners *knowingly, purposely or intentionally* billed the purchaser for greater weights than were delivered to and received by the purchaser.

Admittedly, petitioners were not notified, either by the purchaser or by the Administrator, of the alleged receipt of the lesser weights before the filing of this suit; and that immediately upon learning of the buyer's claim that lesser weights were received than were ordered and invoiced, petitioners mailed corrected invoices for such weights *at the agreed legal price of 45¢ per pound*, refused to accept a check for the amount of the original invoices, but subse-

quently received and accepted payment for the weights claimed to have been received by the purchaser *at the agreed, legal rate of 45¢ per pound.* (R. 84-85, 56-57, 61-63, 142, 147, 151-152).

When the Administrator rested his case, petitioners moved for an instructed verdict on the ground that *no violation had been proved as charged.* The motion was overruled, and petitioners excepted. (R. 139.)

Petitioners proved they operate a large concern with many departments and do a large monthly volume of business (R. 141, 145); that petitioners had no particular knowledge of these orders and shipment, except as reflected by their office records (R. 145, 147); that these orders were received, filled and shipped in the regular course of business (R. 142-145, 158); that *petitioners' records and the Express Company Bills of Lading showed shipments of the weights of poultry ordered by the purchaser* (R. 152, 158, 55-56, 59-60); that *invoices for those weights at the agreed, legal charge of 45¢ per pound were mailed to the buyer* (R. 61); that petitioners first learned that the buyer claimed to have received lesser weights upon delivery when suit was filed (R. 147, 150); that petitioners promptly mailed invoices for the lesser weights claimed to have been received by the purchaser, *at the agreed, legal charge of 45¢ per pound* (R. 151), *refused to accept payment in the total amount of the original invoices* (R. 152), but subsequently collected and accepted payment for the number of pounds claimed to have been received by the purchaser, *at the agreed, legal price of 45¢ per pound.* (R. 152, 56-57, 63).

When the case was concluded, petitioners moved for an instructed verdict; the motion was overruled, and petitioners excepted. (R. 167).

There was no proof that petitioners and the buyer made a sale agreement for the poultry at a price exceeding the O. P. A. ceiling price, it being uncontroverted that *the sale was of a designated quantity of poultry by weight, at an agreed, legal price of 45¢ per pound.* Nor was there proof that the amount charged for the poultry sold was in excess of the ceiling price. Admittedly, the buyer ordered and bought 800 pounds and 300 pounds, respectively, of poultry at a *legal price of 45¢ per pound,* which was below the ceiling price, and that petitioners agreed and sought to fill and deliver those orders *at such price per pound.* The buyer did not agree to buy and petitioners did not agree to sell the poultry on any basis other than *the agreed legal price of 45¢ per pound;* and the poultry was not sold or bought by the number of chickens or by the quantity of boxes of chickens, but were bought and sold solely *by weight* at the agreed, legal price of 45¢ per pound.

Neither the buyer nor seller are shown by the proof to have had a sale agreement for the lesser weights received by the buyer, in consideration of the payment or agreement to pay for the greater weights charged in the invoice. The sole sale proved was of the quantity *by weight* of poultry invoiced *for the agreed consideration or sale price of 45¢ per pound.*

It was the *theory* and *suspicion* of the Administrator that the sale and purchase was of the lesser weights but for a consideration and price in excess

of the maximum fixed price of 46.68¢ per pound, and that such illegal sale was sought to be camouflaged by the suberfuge of invoices for greater weights at a legal rate per pound.

In the absence of proof by the administrator that petitioners even *knew* of the delivery of the lesser weights, there is no proof of any intention or purpose of petitioners to sell or deliver the lesser weight, much less to charge for the greater weights shown in the invoices. There being no proof of the sale of the lesser weights received by the purchaser for the total consideraiton or sale price charged in the invoices for the larger weights, nor that petitioners *knowingly* shipped or delivered less poultry than invoiced, nor *knowingly* invoiced the buyer for a greater amount of poultry than was delivered, the Administrator wholly failed to prove that petitioners committed a violation of the O. P. A. Maximum Price Regulation herein, or of the Emergency Price Control Act.

It is well settled that the Administrator has the burden of proof in actions to recover penalties for violations of the Price Control Act by over-ceiling sales. *Barnes vs. Bowles* (C.C.A. 5), 157 Fed. (2d) 790; *Henderson vs. Beaird* (D. C. La.), 48 F. Sup. 252; *Bowles vs. Cohn* (D.C. N.Y.), 57 F. Sup. 306; *Bowles vs. Hansen Packing Co.* (D.C. Mont.), 64 F. Sup. 131.

The Courts universally recognize that in injunction and penalty suits, as well as criminal prosecutions, *knowledge* of the commission of *acts* which constitute a violation of price regulations and the

Price Control Act is an essential element to be proved by the complainant.

In *Bowles vs. Arlington* (C.C.A. 7), 148 Fed. (2d) 467, dealers, through auctioneers, sold used machinery as rebuilt and guaranteed. The complaint charged the machinery actually sold was in "as is" condition, thus sold at excessive prices. The Circuit Court held the evidence insufficient to show the auctioneers had *knowledge* the machines were not rebuilt and guaranteed when sold as such, and thus insufficient to prove a violation by the auctioneers.

In *Bowles vs. Assad* (D.C. Penn.), 56 F. Sup. 8, a broker handling a shipment of scrap steel in good faith and without *knowledge* of the content, was held not to have violated the price regulation.

In *Brown vs. Bananna Distrib. of America* (D.C. Conn.), 52 F. Sup. 804, the complaint charged violation of O. P. A. ceiling prices by a tying-in agreement assertedly used as a means of evasion, and it was held that to show a violation it must be made to appear that *the practice was so used.*

In *Bowles vs. Cunningham* (D.C. Penn.), 61 F. Sup. 162, it was held that as the defendant had no *knowledge* of the payment of transportation costs exceeding the price regulation, he was not properly chargeable with violation of the price regulation, and no injunction would issue.

Henderson vs. Glosser (D.C. Penn), 46 F. Sup. 460, is identical in principle with the present case. The defendant was charged with violating the price regulation by purchasing scrapiron at prices exceeding the maximum, fixed price. Defendant admittedly sold a scrapiron company two presses at a specified

price to be paid for in No. 1 scrapiron at a regular base price of $20.00 per ton. Two carloads of low-grade scrapiron, invoiced as No. 1 scrapiron, were received and used by the defendant. Upon discovery of the lower grade of scrap it was utilized by the defendant, but the shipper was notified of the defective quality, and that credit would be given only for the price of the lower grade metal. It was held that the proof was insufficient to establish a violation by defendant of the price regulation, proof of the acceptance and use of the steel being insufficient to show a purchase in violation of the price regulation in absence of payment of, or an agreement to pay, the higher price.

In *U. S. vs. Steiner*, (C.C.A. 7), 152 Fed. (2d) 484, 487, the complaint charged violation of O. P. A. ceiling prices by tractor sales, and the defense was that a *bona fide* lease transaction occurred. The Court held a question of fact was presented to determine whether a good faith lease existed or whether there was a *knowing, intentional and wilful device to evade* the statute and price regulation.

In *Zimburg vs. United States*, (C.C.A. 1), 142 Fed. (2d) 132, defendant had issued invoices showing delivery of 184 pounds and 764 pounds of beef at a legal price per pound, but it was alleged that defendant in fact made a sale of lesser weights at excessive prices. The purchaser testified that prior to the transaction defendant advised him he would be required to pay 30¢ per pound, an amount in excess of the ceiling price, *regardless of weights shown by the invoices*, and that the weights actually delivered were such that the purchase and sale was actually at

30¢ per pound. The Court held that as there was evidence that defendant *knowingly* used a scheme, method and practice to evade the price regulation, the evidence was sufficient to sustain conviction.

In *Porter vs. Hoffman*, (D.C. Cal.), 65 F. Sup. 492, the complaint charged sales of meat at prices exceeding O. P. A. maximum prices. It was held that since the most the testimony for the Administrator accomplished was to cast suspicion on the methods of defendant, and was speculative as concerned the alleged *violation*, the defendant was entitled to judgment.

In *Brown vs. Schagrin*, (D.C. Del.), 64 F. Sup. 345, the action was to recover a penalty of treble damages for alleged violation of an O. P. A. maximum price regulation. It was held that defendant's explanation of facts concerning the alleged violation must be taken as true since the O. P. A. investigators failed to check and prove the inaccuracies of such explanation.

See also *Greely vs. Thompson*, 51 U. S. 225, 10 How. 225, 13 L. Ed. 397, holding that when doubt exists as to whether a penalty should be imposed, the person upon whom it would be imposed should be favored.

Third Point

Whether or not petitioners violated the Emergency Price Control Act and the O.P.A. Maximum Price Regulation herein, by selling or delivering poultry at prices in excess of the maximum fixed price, was a fact issue which should have been sub-

mitted to the jury, and the timely request of petitioners for the specific submission of such issue should have been granted by the trial court.

Before submission of the Court's charge to the jury, petitioners presented to the Court and requested the submission of special issues for the jury to find whether or not petitioners charged the purchaser in excess of the legal price per pound for the poultry, whether or not petitioners wilfully or knowingly delivered less weights than invoiced with the purpose or intent to charge or collect a price which was in excess of the maximum legal price, whether or not petitioners knew a shortage existed in the poultry delivered and received by the purchaser when petitioners billed the purchaser by the original invoices, and to find what quantity of poultry was knowingly and intentionally delivered by petitioners to the buyer. The requested issues were refused by the Court and exceptions taken. (R. 13-25).

The Court charged the jury that the complaint of the Administrator alleged petitioners violated the Emergency Price Control Act and the O. P. A. Maximum Price Regulation herein by *an actual sale and delivery of shortweights and a charge for greater weights at a legal price per pound,* thus resulting in an overcharge for the actual sale of shortweights (R. 169-170); that the alleged violations were not by reason of petitioners charging in excess of the ceiling price per pound, but that *if any violations were in fact committed it was by reason of the sale of shortweights.* (R. 170-171). Only eight Special Issues

were submitted, composed of four inquiries relating to each of the two shipments:

1. Whether petitioners *delivered* less than the specified weights in the original invoices (R. 172-173, 176);
2. The number of pounds actually *delivered* in each shipment (R. 173, 176-177);
3. Whether the *deliveries* of lesser weights than invoiced were not wilful (R. 174, 177); and
4. Whether the *deliveries* of lesser weights than invoiced were not the result of petitioners' failure to take practicable precautions against the occurrence of the violation (R. 175-176, 178).

Petitioners timely and properly objected and excepted to the Court's charge because of the failure to submit the issues requested by petitioners, because the Court failed to submit any issue for the jury to find whether petitioners *knowingly* shipped and delivered less weights than invoiced to the buyer, and because the Court failed to submit any issue for the jury to find whether petitioners *knowingly* charged the buyer for the weights invoiced with *knowledge* that lesser weights had been shipped and delivered to the buyer. (R. 28-32).

As has been previously argued, at no stage of the trial was any proof presented by the Administrator to show sales by petitioners at prices in excess of the O. P. A. ceiling prices in violation of the Price Control Act, and therefore petitioners' respective motions for instructed verdict, when the Administrator

rested his case and when the whole case had closed, should have been sustained.

However, in view of the action of the trial court in overruling the motions for instructed verdict, petitioners timely and properly requested the submission of special issues to obtain a specific finding of the jury whether or not petitioners had made *sales* of poultry at prices in excess of O. P. A. ceiling prices and thus had made an illegal overcharge to the buyer in violation of the Emergency Price Control Act. That question was the crux of the Administrator's complaint and the heart of the case. It was a fact question to be determined by the jury. *Bowles vs. Goebel*, (C.C.A. 8), 151 Fed. (2d) 671, 675; *Flanagan vs. United States*, (C.C.A. 9), 154 Fed. (2d) 740; *United States vs. Lutz*, (C.C.A. 3), 142 Fed. (2d) 985; *Brown vs. Quinlan*, (C.C.A. 7), 138 Fed. (2d) 228; *Shearer vs. Porter*, (C.C.A. 8), 155 Fed. (2d) 77.

Subordinate fact issues required to be submitted to the jury for findings, *only if and after a violation was found*, were the affirmative defensive issues (1) whether the violation was not wilful, and (2) whether the violation was not the result of a failure to take practicable precautions against its occurrence. *Shearer vs. Porter*, (C.C.A. 8), 155 Fed. (2d) 77; *Bowles vs. Goebel*, (C.C.A. 8), 151 Fed. 671, 675; *Bowles vs. Hansen Packing Co.*, (D.C. Mont.), 64 F. Sup. 131, 134.

Moreover, petitioners timely and properly objected and excepted to the Court's charge because of its failure to include any issue for the jury to find specifically whether petitioners had made sales of poultry

as charged at prices exceeding the O. P. A. ceiling prices in violation of the regulation and the Price Control Act.

The jury was asked by the Court only to find whether the buyer was *delivered* less weights of poultry than invoiced by petitioners, and the actual weights of the poultry *delivered* to and *received* by the purchaser. These issues were inadequate to present the question whether a sale was made by petitioners to the buyer of the lesser, delivered weights for the consideration or price of the total amount of invoice charges.

Conceivably, *innocent* delivery of lesser weights than invoiced may have occurred in numerous ways:

1. Through inadvertent mistake of a clerk, a shipment destined for one buyer may have been shipped to another;
2. Through error of the common carrier, shipment to one buyer inadvertently may have been delivered to another;
3. Through pilferage or mishap, a portion of the shipment to the buyer may have been lost, after delivery of the correct weights to the common carrier by the seller and while the shipment remained in the custody of the common carrier;
4. Through pilferage or other mishap, a portion of the contents of the shipment may have vanished after delivery to the buyer and before the delivered shipment had been weighed.

An *inadvertent, mistaken, unknowing or uninten-*

tional delivery of lesser weights than invoiced would not constitute a *sale* of the lesser weights at the total invoice charge for the greater weights. Mere proof of the *delivery* of lesser weights than invoiced would not constitute even *prima facie* proof of a sale of the lesser weights for the consideration or price of the total invoice charge, *in absence of proof that delivery of the lesser weights and invoices for the greater weights was knowingly, voluntarily or purposely made by the seller.*

The trial court clearly committed error in failing to submit specifically the issues requested by petitioners; and the Circuit Court of Appeals erred in overruling the assignments of error upon this point properly raised by petitioners, and in affirming the trial court judgment.

Fourth Point

The jury necessarily found, in answers to Special Issues Nos. 3 and 7, that petitioners did NOT violate the Emergency Price Control Act and the O.P.A. Maximum Price Regulation herein by selling and delivering poultry at prices in excess of the O.P.O. maximum fixed price, since the jury found that petitioners did not wilfully or knowingly deliver less weights of poultry than invoiced.

As previously recited, the requested special issues of petitioners for the jury to find specifically whether petitioners violated the O. P. A. Regulation and the Price Control Act by selling shortweights at the invoice charge for greater weights were refused by

the trial court (R. 13-25); and petitioners properly objected and excepted to the charge of the Court because of the failure to submit special issues for the jury to find specifically whether petitioners had overcharged the buyer in violation of the Maximum Price Regulation and Price Control Act by selling short-weights for the total consideration or price invoiced for the greater weights. (R. 28-32).

The only issues submitted to the jury were:

(1) Whether petitioners *delivered* less weights than invoiced;

(2) The specific number of pounds *delivered* to the purchaser;

(3) Whether the *deliveries* of such lesser weights were not wilful; and

(4) Whether the *deliveries* of such lesser weights were not the result of a failure to take practicable precautions. (R. 172-178).

The jury found in answers to these issues:

(1) That petitioners *delivered* less weights than invoiced (R. 32, 35);

(2) The actual weights *delivered and received* by the purchaser (R. 33, 36);

(3) That the *deliveries* of lesser weights than invoiced were not wilful (R. 33-34; 36-37); and

(4) That the *deliveries* of lesser weights than invoiced were not the result of failure to take practicable precautions. (R. 34-35, 37-38).

Petitioners moved for judgment upon the answers of the jury to Special Issues 3, 4, 7 and 8 (that the deliveries of lesser weights than invoiced were not wilful nor the result of failure to take practicable precautions), the ground urged being that such answers necessarily constituted *a finding that no violation had been committed by petitioners as charged.* (R. 39-42). The motion was overruled and exception taken (R. 186-187).

Assuming that the mere *delivery* of lesser weights than invoiced constituted a *sale* of the lesser weights at a price of the total of the invoice charge for the greater weights, the trial court entered judgment for the Administrator, assessing against petitioners a single penalty for the amount of the purported overcharge. (R. 42, 49).

The only apparent basis for the refusal of the trial court to submit *specifically* appropriate special issues for the jury to find whether petitioners violated the Regulation and Act by selling short-weights for the consideration or price charged in the invoices for greater weights is that the Court clumsily submitted the question in Special Issues Nos. 3 and 7, for findings whether petitioners wilfully or knowingly *delivered* lesser weights than invoiced, as the Court charged in connection with such issues that the term "wilful" implies "*a knowledge and purpose to do wrong.*" The findings of the jury to these issues therefore necessarily amount to a finding that *petitioners did not knowingly or with wrongful purpose deliver the lesser weights.* As petitioners did NOT knowingly or with wrongful purpose deliver lesser weights than

invoiced, petitioners could not conceivably have *sold* the lesser weights for the price as invoiced for the greater weights; if petitioners did not knowingly or with wrongful purpose deliver lesser weights than invoiced, petitioners could not knowingly or with wrongful purpose have *invoiced* for the greater weights.

For petitioners to have *sold* the lesser weights for the total consideration of the invoice charge for the greater weights, petitioners must necessarily have *knowingly and purposely* delivered the lesser weights, and *knowingly and purposely* invoiced for greater weights.

The findings that petitioners did NOT knowingly or with wrongful purpose *deliver* lesser weights than invoiced are diametrically antagnostic to the existence of a sale of the lesser delivered weights for the total consideration or invoice charge for the greater weights. Particularly is this true when the undisputed proof is that the sales herein were of poultry, *by weight, at an agreed, legal price per pound;* the invoices were for poultry, *by weight, at the agreed legal price per pound;* and petitioners received and accepted payment only for the weights actually delivered, *at the agreed, legal price per pound.*

As the jury found that petitioners did not knowingly or voluntarily deliver lesser weights than invoiced, and that the deliveries of lesser weights than invoiced were not the result of a failure to take practicable precautions, and these findings are diametrically opposed to the existence of a sale and overcharge in violation of the Regulation and Act, the trial court clearly erred in rendering judgment

penalizing petitioners; and the Circuit Court of Appeals erroneously denied the assignment of error upon this point in affirming the judgment of the trial court.

Conclusion

The rulings and errors of the Circuit Court of Appeals in this case are patently and grossly unjust to petitioners, who have been adjudged guilty of violating the O. P. A. Maximum Price Regulation and the Emergency Price Control Act by charging excess prices for poultry despite the *uncontradicted* evidence that petitioners sold and the purchaser bought the poultry *by weight at a legal price per pound,* that petitioners invoiced the buyer for the poultry *at a legal price per pound,* that the petitioners shipped to the buyer, by common carrier, the weights of poultry for which invoices were sent the buyer, and that *the deliveries* to the buyer of lesser weights than invoiced *were without the knowledge of petitioners;* and the jury found petitioners *neither willfully nor carelessly delivered lesser weights than invoiced.*

Petitioners respectfully, but earnestly, urge that the District Court and the Circuit Court of Appeals, respectively, erred in the respects set forth in the Specification of Errors herein.

Petitioners pray that a Writ of Certiorari issue to the end that the judgments of the Circuit Court of Appeals and of the District Court herein be reviewed, reversed and judgment rendered for petitioners; alternatively, that the judgments of the Cir-

cuit Court of Appeals and the District Court be reversed and this cause remanded for a new trial; and for such other orders and relief to which petitioners may be justly entitled.

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Copies of this brief have been served upon respondent by mailing such copies to the Solicitor General of the United States, Washington, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and regulation involved	2
Statement	3
Argument	6
Conclusion	12
Appendix	13

CITATIONS

Cases:

Bowles v. *American Stores*, 139 F. 2d 377, certiorari denied, 322 U. S. 730	6
Bowles v. *Franceschini*, 145 F. 2d 510	7
Bowles v. *Goebel*, 151 F. 2d 671	8, 10
Bowles v. *Heinel Motors, Inc.*, 59 F. Supp. 759, affirmed, 149 F. 2d 815, certiorari denied, 326 U. S. 760	8
Bowles v. *Indianapolis Glove Co.*, 159 F. 2d 597, certiorari denied, 326 U. S. 794	7
Bowles v. *Krodel*, 149 F. 2d 398	8
Bowles v. *Leventhal*, 61 F. Supp. 144 reversed 160 F. 2d 52	9
Brown v. *Banana Distributors of Connecticut*, 52 F. Supp. 804	8
Brown v. *Mars*, 135 F. 2d 843, certiorari denied, 320 U. S. 798	10
Brown v. *Quinlan*, 138 F. 2d 228	10
Duffy v. *Howell*, 166 P. 2d 411	9
Flannagan v. *United States*, 145 F. 2d 740	10
Hecht Co. v. *Bowles*, 321 U. S. 321	8
Kenney v. *Hood*, 158 F. 2d 226	7
Porter v. *Bledsoe*, 159 F. 2d 495	7, 9, 10
Porter v. *Crawford & Doherty Foundry Co.*, 154 F. 2d 431, certiorari denied, October 14, 1946, No. 161, Oct. T., 1946	7, 9
Shearer v. *Porter*, 155 F. 2d 77	10
United States v. *Bruno*, 329 U. S. 207	10
United States v. *Lutz*, 142 F. 2d 985	10

741930—47

Statute and regulation:
Emergency Price Control Act of 1942, as amended (56 Stat. 23; 58 Stat. 632; 59 Stat. 306; Pub. Law 548, 79th Cong., 2d sess.; 50 U. S. C. App., Supp. V, 901 *et seq.*) 2
Sec. 205 ..... 6, 8, 10, 13
Sec. 302 ..... 8, 9, 15
Revised Maximum Price Regulation 269 (9 F. R. 15095) .. 2, 16
Miscellaneous:
Rule 49 (a), F. R. Civ. P 11, 16
S. Rep. 922, 78th Cong., 2d sess., p. 14 6
1 Williston, *Sales* (2d ed. 1924), Sec. 279 9

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1215

LEONARD EAST AND ALVIN G. EAST, DOING BUSINESS AS L. EAST PRODUCE COMPANY, PETITIONERS

v.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The district court did not render an opinion. The opinion of the Circuit Court of Appeals (R. 190–192) is reported at 158 F. 2d 227.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 2, 1946 (R. 192), and a petition for rehearing was denied January 7, 1947 (R. 201). The petition for a writ of certiorari was filed April 7, 1947. The jurisdiction

of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a seller who has invoiced a shipment at a legal price per pound but has shipped less than the invoiced poundage is liable in a damage action under Section 205 (e) of the Emergency Price Control Act, where the resulting alleged overcharge was not wilful or due to failure to take practicable precautions.

2. Whether in an action for statutory damages under the Emergency Price Control Act, the trial court's submission of the case to the jury was erroneous because (a) it was submitted for special verdict on particular issues of fact rather than for a general verdict and (b) the form in which the particular instructions presented the issue of petitioners' responsibility for the short-weight shipment was allegedly inadequate.

STATUTE AND REGULATION INVOLVED

The statute and regulation involved are the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 58 Stat. 632, 59 Stat. 306, Pub. Law 548, 79th Cong. 2d Sess.; 50 U. S. C. App. Supp. V., 901 *et seq.*) and Revised Maximum Price Regulation 269 (9 F. R. 15095), the pertinent provisions of which are set out in the Appendix, *infra,* pp. 13–17.

STATEMENT

Pursuant to Section 205 (e) of the Emergency Price Control Act (Appendix, *infra,* pp. 13–15), the Administrator sued petitioners for statutory damages for sales of poultry at prices in excess of maximum prices established by Revised Maximum Price Regulation 269 (R 1–5, 9–12). It was alleged that petitioners sold poultry at 45 cents a pound, a sum within the maximum price, but billed the buyer for more pounds than petitioners shipped and delivered (R 4, 11). The invoices were in the amount of $495.00 for 1,100 pounds of poultry, whereas petitioner delivered only 724 pounds, 6 ounces, which at the ceiling price of 46.68 cents per pound indicated a maximum price for the sales of $338.14, the resulting alleged overcharge being $156.86 (R. 11).

The defense was based primarily on the theory that there was no violation because there was no allegation or proof that petitioners wilfully or intentionally shortweighted the buyer, and secondarily, if there was a violation, it was not wilful or the result of failure to take practicable precautions (R. 6, 12, 13–27, 28–32, 185–186).

Evidence was presented to the effect that petitioners had made two shipments of poultry to the buyer by Brown Express, express prepaid, of 800 pounds and 300 pounds respectively (R. 58, 59, 60, 166); that the seller had invoiced the

shipments as 800 pounds fryers, and 300 pounds fryers (R. 58, 61, 71–72); that the Express Company always made out their bills of lading for the gross weight, which in addition to the poultry would include the crate, ice, etc. (R. 165, 121); that the boxes in which the poultry was shipped were not opened in transit, or their contents dissipated (R. 93, 103, 130); that the consignee had weighed the poultry actually shipped and found less poultry than had been ordered and billed (R. 77–78); that the total sum for which the shipments were billed was $495.00 (R. 58, 61); that the ceiling price was 46.68 cents per pound (R. 55); that the total weight delivered on the two shipments was 530 pounds, 10 ounces, (R. 77) and 193 pounds, 12 ounces, respectively (R. 78). The Administrator also introduced evidence showing that petitioners were under an injunction resulting from purchases of poultry at overceiling amounts (R. 154–155), and that on a previous occasion petitioners had shortweighted the same buyer by a similar percentage (R. 74–75).

Alvin G. East testified to the effect that, if petitioners' shipments were short, it was unintentional (R. 151); that they supposed the poultry would be weighed on receipt (R. 150); and that when, upon institution of the suit, they learned of the claim that the poultry was short,

they returned the check for the original invoice and sent a new invoice for the amount of poultry the consignee claimed to have received (R. 150–152).

The case was submitted to the jury on special issues (R. 168–178), as to which the jury found: (1) That the petitioners' delivery of poultry was less by a specified number of pounds than the amount ordered by and billed to the buyer (R. 43, 44, 45–46); (2) that petitioners had not wilfully or intentionally delivered less than the weight billed (R. 44, 47); and (3) that the short delivery was not the result of failure to take practicable precautions (R. 45, 48).

Petitioners' request for special issues to be submitted to the jury (R. 13–27), and for judgment on the jury's findings (R. 185–186), both based on the theory that the Administrator had to prove that the shortweighted shipments were intentionally made, were denied by the district court (R. 180, 186), which entered judgment for the Administrator for the amount of the overcharges, viz., $156.86 (R. 48–49).

In the Circuit Court of Appeals, the petitioners again urged the theory that the Act was only violated by an intentional shipment of less than the contract amount, but the court affirmed the judgment *per curiam* (R. 190–191). Petitioners reasserted their theory in a petition for rehearing (R. 193–200) which was denied (R. 201).

ARGUMENT

1. Petitioners urge that "the language of the Act patently evidences the intention of Congress to penalize a vendor solely for a voluntary and knowing sale or transfer of property for an agreed price which is in excess of the OPA maximum fixed price for the property" (Br. 16). But the language and legislative history of Section 205 (e) disclose that Congress did intend to establish a cause of action for statutory damages where a seller has unintentionally participated in an overceiling transaction. As originally drafted, Section 205 (e) made mandatory the award of treble damages whenever an overcharge occurred. *Bowles* v. *American Stores,* 139 F. 2d 377 (App. D. C.), certiorari denied, 322 U. S. 730. The section was amended in 1944 [1] to provide that where the seller established that he had not acted wilfully or with failure to take practicable precautions, the damages would be limited to the amount of the overcharges or $25.00, whichever was larger. This language, as well as the Report of the Senate Banking and Currency Committee,[2]

[1] Section 108 (b) of the Stabilization Extension Act of 1944 (58 Stat. 640); see Appendix *infra*, p. 14.

[2] In explaining the purpose of this amendment, the Senate Committee said: "* * * the court should be permitted * * * to assess something less than treble damages in cases where violations occur unintentionally and despite the exercise of due diligence to prevent them." (S. Rep. 922, 78th Cong., 2d sess., p. 14).

makes it very clear that Congress did not overlook the possibility that a seller may violate a regulation by an unintentional overcharge, but instead provided for a minimum amount of damages to be assessed under such circumstances. Congress doubtless concluded that proof of motive with which the seller acted would be an onerous burden for the Administrator which would seriously impede enforcement activities. *Porter* v. *Bledsoe,* 159 F. 2d 495, 497 (C. C. A. 4). The courts have thus generally held that the seller is liable for damages for at least the amount of the overcharges whenever the buyer has been charged more than the maximum price established by the applicable regulation, even though the violation was an unintentional one. *Porter* v. *Bledsoe, supra; Kenney* v. *Hood,* 158 F. 2d 226 (C. C. A. 5); *Porter* v. *Crawford & Doherty Foundry Co.,* 154 F. 2d 431, 434–35 (C. C. A. 9), certiorari denied, October 14, 1946, No. 161, Oct. T. 1946; *Bowles* v. *Indianapolis Glove Co.,* 150 F. 2d 597, 600 (C. C. A. 7), certiorari denied, 326 U. S. 794; *Bowles* v. *Franceschini,* 145 F. 2d 510, 512–14 (C. C. A. 1).

The cases cited by petitioners in support of their contention that Section 205 (e) requires that the violative acts be intentionally performed (Br. 25–28) are inapposite. In the main, these cases fall into two categories, criminal suits and

741930—47——2

suits for injunctive relief, neither of which involve the same standards applicable to statutory damage actions.[3]

Nor is there any merit to petitioners' contention that the present transaction is not a "sale" within the language of Section 205 (e). Section 205 (e) provides that a "person selling a commodity" at a price in excess of the legal maximum shall be liable for statutory damages "on account of the overcharge." Section 302 (a) indicates that "selling" includes "contracts and offers" to sell. Hence, the seller who is liable under Section 205 (e) "on account of the overcharge" includes one who has contracted or offered to sell at a price higher than the legally

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[3] In the former category, the statute itself, Section 205 (b) requires that the violative acts be wilfully performed, in contrast to Section 205 (e) where no such requirement is made, and in the latter, this Court has stated that the trial court has discretion as to whether an injunction shall issue depending on the facts of each case. *Hecht Co.* v. *Bowles*, 321 U. S. 321. In actions under Section 205 (e), on the other hand, the only discretion vested in the court is the amount of damages to be awarded, not less than the amount of the overcharge and not more than three times that sum. *Bowles* v. *Heinel Motors, Inc.*, 59 F. Supp. 759 (E. D. Pa.), affirmed, 149 F. 2d 815 (C. C. A. 3), certiorari denied, 326 U. S. 760; *Bowles* v. *Goebel*, 151 F. 2d 671 (C. C. A. 8); *Bowles* v. *Krodel*, 149 F. 2d 398 (C. C. A. 7). Nor can petitioner find any support for his contention in *Brown* v. *Banana Distributors of Connecticut*, 52 F. Supp. 804 (D. Conn.). There, the court was dealing with the evasion provision where the motive with which a seller acts is obviously material.

authorized maximum.[4] The shortweighted shipment of poultry here involved, even in the ordinary law of sales, constituted a new offer by petitioners to sell the poultry actually shipped for the total sum billed to the buyer, which when accepted, as it was, by the latter became a binding contract. 1 Williston, *Sales* (2d ed. 1924), Sec. 279; *Porter* v. *Bledsoe,* 159 F. 2d 495, 499 (C. C. A. 4). And it is, of course, just as much an overcharge where the buyer receives less than the

[4] Accordingly, the word "overcharge" as defined in Section 205 (e) ["the amount by which the consideration exceeds the applicable maximum price"] is broad enough to include the excess above the ceiling price in a contract or offer to sell, regardless of the acceptance or nonacceptance of payment of the overceiling amount. Cf. *Porter* v. *Crawford & Doherty Foundry Co.*, 154 F. 2d 431 (C. C. A. 9), certiorari denied, October 14, 1946, No. 161, Oct. T., 1946; *Duffy* v. *Howell*, 166 P. 2d 411 (Cal. Super. Ct., App. Div); *Bowles* v. *Leventhal*, 61 F. Supp. 144 (S. D. N. Y.), reversed on other grounds 160 F. 2d 52 (C. C. A. 2).

The definitions of "maximum price" in Section 302 (i) and of "price" in Section 302 (b) corroborate the above analysis and produce a complete consistency with the other definitions. Thus "maximum price" is defined as the "maximum lawful price," and "price" is defined as the "consideration demanded or received in connection with the sale of a commodity." Hence, "maximum price" means the maximum consideration which may lawfully be *demanded* or received in connection with a sale, transfer, etc., or contract of sale, transfer, etc.

Taking into account, then, all of the other definitions, the definition of "overcharge" is to be understood as follows: The amount by which the consideration exceeds the maximum consideration which may lawfully be demanded or received in connection with the sale, transfer, etc., or contract or offer of sale, transfer, etc.

quantity ordered and billed at ceiling prices (*Brown* v. *Mars,* 135 F. 2d 843, 849 (C. C. A. 8), certiorari denied, 320 U. S. 798) as it is where he receives less than the quality ordered and billed at ceiling prices. (*United States* v. *Bruno,* 329 U. S. 207; *Porter* v. *Bledsoe, supra*), or the correct quantity and quality at prices which are above ceiling.

2. (a) Petitioners contend that there should have been submitted to the jury the question of whether petitioners violated the Act and Regulation by selling or delivering poultry at prices in excess of the applicable maximum price (Br. 28–29). The question as framed by petitioners appears to be a request for a general verdict. However, none of the cases cited by petitioners (Br. 31) support the proposition that a statutory damage action under Section 205 (e) must be submitted to a jury for a general verdict. In fact, the only cited case in point,[5] *Shearer* v. *Porter,* 155 F. 2d 77 (C. C. A. 8), expressly holds that a statutory damage action under the Emergency Price Control Act can be submitted to a

[5] *Flannagan* v. *United States,* 145 F. 2d 740 (C. C. A. 9), and *United States* v. *Lutz,* 142 F. 2d 985 (C. C. A. 3), are criminal cases, obviously inapplicable to the present case. *Brown* v. *Quinlan,* 138 F. 2d 228 (C. C. A. 7) was an action for a preliminary injunction which was not tried to a jury. *Bowles* v. *Goebel,* 151 F. 2d 671 (C. C. A. 8), did not involve the issue of whether the court had to submit the case for a general verdict, but held that where the court did so submit the case it did not err; and the same Circuit Court of Appeals decided the *Shearer* case, cited in the text.

jury for special verdict (155 F. 2d at 82). See Rule 49 (a), F. R. Civ. P., *infra*, p. 16.

(b) Nor is there any merit to petitioners' contention that the issues submitted to the jury were inadequate to present the question of petitioners' responsibility for the poultry actually delivered (Pet. 32). The issues submitted included an inquiry as to whether "defendants * * * delivered less than the invoiced amount of poultry" (R. 43, 45–46). Clearly, the affirmative answer to the inquiry rules out any inference that any outside agency caused the delivery of the lesser amount. Further, the testimony presented by the Administrator (R. 93, 103, 130), unrebutted by petitioners, clearly shows that the shipment was not tampered with after it left the seller's control. Petitioners, in the trial court, never even seriously contended that the character or the quantity of the shipment changed after it left their premises and before it was delivered to the buyer; in their numerous requests for special interrogatories (R. 12–27), and in their exceptions to the court's charge (R. 28–32), there is no indication that petitioners thought the issue was presented by the evidence and should, therefore, be submitted to the jury. It is therefore clear that even if such issue of fact were raised by the evidence and had not been submitted to the jury, the petitioners waived their right to a trial by jury on the issue. Rule 49 (a), F. R. Civ. P.

CONCLUSION

The decision of the court below is correct, this is no conflict of decision, and the case does not warrant further review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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MAY 1947.

APPENDIX

1. Pertinent provisions of the Emergency Price Control Act of 1942, as amended (56 Stat. 23, 58 Stat. 632, 59 Stat. 306, Pub. Law 548, 79th Cong. 2d Sess., 50 U. S. C. App. Supp. V. 901 et seq) are:

SEC. 205.

* * * * *

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may,[1] *within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge.* ***In any action under this subsection,***[2] *the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is*[3] *greater:*

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[1] Remainder of subsec. (e) amended by sec. 108 (b) of the Stabilization Extension Act of 1944. Originally read, in place of italicized language: "* * * bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court."

[2] As amended by sec. 12 (a) of the Price Control Extension Act of 1946. Previously read, in place of bold-faced language: "In such action."

[3] As amended by sec. 12 (a) of the Price Control Extension Act of 1946, deleting "the" at this point.

(1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges[4] *if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation.*

For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; *and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price.*[5] If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer *either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action*

[4] As amended by sec. 12 (a) of the Price Control Extension Act of 1946, deleting "or $25, whichever is greater," at this point.

[5] Added by sec. 108 (b) of the Stabilization Extension Act of 1944.

for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.[6] * * *

SEC. 302. As used in this Act—

(a) The term "sale" includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms "sell," "selling," "seller," "buy," and "buyer," shall be construed accordingly.

(b) The term "price" means the consideration demanded or received in connection with the sale of a commodity.

* * * * *

(i) The term "maximum price", as applied to prices of commodities means the maximum lawful price for such commodities, and the term "maximum rent" means the maximum lawful rent for the use of defense-area housing accommodations.

[6] As amended by sec. 108 (b) of the Stabilization Extension Act of 1944. Formerly read, in place of italicized language: "* * * is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act."

2. Rule 49 (a), F. R. Civ. P., is as follows:

Rule 49. Special Verdicts and Interrogatories

(a) SPECIAL VERDICTS. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

3. Pertinent provisions of revised Maximum Price Regulation 269 (9 F. R. 15095) are:

SEC. 1.3. *What this regulation prohibits*—(a) *Prohibition against sales of poultry items at prices above the maximum.* Regardless of any contract, agreement or other obligation, no person shall sell or deliver or

cause to be sold or delivered, whether for his own account or otherwise, the poultry items specified in this regulation at a price higher than the maximum prices established by this regulation; and no person in the course of trade or business shall buy or receive such poultry items at a price higher than the maximum prices established by this regulation; and no person shall agree, offer, solicit or attempt to do any of the foregoing.

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